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No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

95-6556

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY R. GALLAGHER
Chief Federal Defender
*DANIEL DONOVAN
Assistant Federal Defender
Federal Defenders of Montana
9 Third Street North, Suite 302
Great Falls, Montana 59401
(406) 727-5328

*Counsel of Record

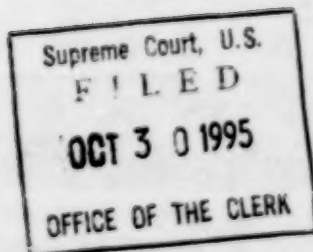


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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Mr. Johnny Lynn Old Chief, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is unreported. The Order of the Court of Appeals denying a Petition for Rehearing and rejecting the Suggestion for Rehearing *En Banc* (App. B) is likewise unreported.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 5, 1995. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 2, 1995. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 18 U.S.C. §922(g)(1), Felon in Possession of a Firearm, are replicated at App. C. Although not specifically raised below, Mr. Old Chief's argument necessarily implicates his constitutional rights to Due Process and to a Trial by a Fair and Impartial Jury. Therefore, the relevant provisions of the Fifth and Sixth Amendments to the United States Constitution are reproduced at App. D.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. Introduction

The Ninth Circuit Court of Appeals denied Petitioner Johnny Lynn Old Chief's (hereinafter referred to as Mr. Old Chief) appeal of his conviction. Mr. Old Chief was convicted of Felon in Possession of a Firearm, Using or Carrying a Firearm During Commission of a Violent Crime, and Assault With a Dangerous Weapon, felonies, in violation of 18 U.S.C. §922(g), 18 U.S.C. §924(c) and 18 U.S.C. §1153 and 113(c). The Ninth Circuit affirmed the conviction but vacated the sentence and remanded for resentencing. Mr. Old Chief has now been resentenced. Sentencing is not an issue in this Petition.

2. Course of the Proceedings

On February 18, 1994, Mr. Old Chief appeared in Court and pled "Not Guilty" to the offenses alleged in the Indictment. After Mr. Old Chief's Arraignment, various pretrial matters were raised. The Defense filed Pretrial Motions, including a Motion in Limine and a Motion to Compel Fingerprint Evidence Examination. The District Court held a hearing on the Pretrial Motions and denied the Motion in Limine and the Motion to Compel Fingerprint Evidence Examination.

A jury trial was held on June 13 and 14, 1994. The jury returned a verdict of guilty to all three counts on June 14, 1994. Having received a Presentence Investigation Report, the District Court held the Sentencing Hearing on July 26, 1994. The District Court sentenced Mr. Old Chief to a term of 15 years (180 months) of imprisonment, to be followed by three (3) years of supervised release.

3. Disposition in the District Court

a. Original Sentence

Mr. Old Chief was committed to the custody of the Bureau of Prisons to be imprisoned for a term of 15 years (180 months). This term consists of 120 months on Count I and 60 months on Count III, the terms to run concurrently. A term of 60 months on Count II is to run consecutively with the terms imposed on Counts I and II. This 15-year term of imprisonment is to be followed by placement on supervised release for a period of 3 years.

b. Sentence on Remand

On remand, the District Court imposed sentence identical to the one originally imposed: 15 years to be followed by 3 years of supervised release. Mr. Old Chief has instituted an appeal

of his second sentence to the Ninth Circuit Court of Appeals. This appeal is presently pending and does not impact the issues raised here.

4. Disposition in the Court of Appeals

Mr. Old Chief appealed both his conviction and his sentence to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the conviction, vacated the sentence and remanded the case for resentencing. The issue here was specifically raised by Mr. Old Chief and denied by the Ninth Circuit Court of Appeals. See Appendix A at pp. 2a-3a.

B. STATEMENT OF THE FACTS

1. The Underlying Events

As the prosecution stated during summation, "[e]verybody seemed to be drinking. All the witnesses seemed to be drinking and drinking heavily." The events in this case occurred on October 23, 1993 in Browning, Montana on the Blackfeet Indian Reservation. Three separate groups of people were involved. The incidents occurred at two different locations, Ick's Bar and the old Exxon gasoline station.

Four people - Stacey Everybody Talks About, Stephanie Spotted Eagle, Jess Wesley Crawford and the Defendant, Johnny Old Chief, were riding around the Browning area during the day in a pickup truck. The pickup was owned by Ms. Everybody Talks About's boyfriend, Marvin England, and Ms. Everybody Talks About did all the driving. Various purchases of alcohol were made. In particular, the driver, Ms. Everybody Talks About, was drinking beer to the point that she cannot remember how many beers she had because she drank so many.

Later in the day, Mr. Crawford, a paraplegic, got tired and asked to be dropped off at his home. Mr. Crawford, a car dealer, had a bank bag of money and a 9mm pistol under the

seat of the pickup. After Mr. Crawford was dropped off, the pistol was left under the seat of the pickup by mistake.

The gun belonged to Mr. Crawford. It was placed under the seat of the pickup by Ms. Everybody Talks About. Mr. Old Chief was not aware that the gun was there. Mr. Crawford never told Mr. Old Chief that the gun was there.

Sometime after dropping Mr. Crawford off, the three others got back together in the same pickup, with Ms. Everybody Talks About still driving. They parked the vehicle in front of Ick's Bar. Subsequently, another vehicle, a Suburban, pulled up with two individuals, Anthony Calf Looking and Louis Reeves.

Mr. Calf Looking and Mr. Reeves had been drinking all weekend. Mr. Calf Looking testified that they "drank a couple of cases of beer that day" and, as a result, he "can't remember too much." Mr. Reeves said that he had been "kind of drunk all weekend," that he had been on a drinking binge. Mr. Reeves admitted that, having drank beer and whiskey, he did not have a clear memory of the events which occurred in front of Ick's Bar.

Because he was drunk, Mr. Calf Looking picked a fight with Mr. Old Chief. Mr. Calf Looking stated, "Who wants to fight" and "You think you are tough?" He then hit Mr. Old Chief and knocked him to the ground. Mr. Calf Looking took off running. After he had gotten across the street, he heard a gun shot. Notably, Mr. Calf Looking does not think that the shot came in his direction at all.

No one, except Ms. Everybody Talks About, claimed to have seen Mr. Old Chief with the gun. Mr. Calf Looking never saw Mr. Old Chief with a gun. Mr. Reeves never saw Mr. Old Chief with a gun. Ms. Spotted Eagle admitted that she was the one who grabbed the gun

from under the seat and shot the gun, not Mr. Old Chief. The next day, Ms. Everybody Talks About told Mr. Crawford that Mr. Old Chief had gotten into a fight and that she fired Mr. Crawford's pistol.

The three, Stacey Everybody Talks About, Stephanie Spotted Eagle and Johnny Old Chief, left Ick's Bar in the pickup and drove to the old Exxon station nearby. They parked and, within minutes, a vehicle with Marvin England and Kim Radasa pulled up. Mr. England had been drinking with Mr. Radasa "all day and night." Mr. Radasa had been drinking for two days and the two of them had consumed a case and one-half of beer by the time they got to the old Exxon station. At the old Exxon station, Mr. England and Mr. Radasa heard a shot go off, but did not see Mr. Old Chief with a gun. Ms. Everybody Talks About gave conflicting testimony. At one point, she testified that Mr. Old Chief fired one shot in the air at the old Exxon station. Later, she admitted that she did not see Mr. Old Chief fire a shot there. According to Ms. Spotted Eagle, the gun was in the pickup where Ms. Everybody Talks About had put it back under the seat. As Ms. Everybody Talks About was unloading the gun at the old Exxon building, the gun discharged.

Mr. Old Chief did not make a statement, nor did he testify. However, four bullets and one shell casing were found in his pocket. A latent fingerprint was discovered on the magazine of the pistol.

This fingerprint did not match the known fingerprints of Mr. Old Chief nor the known fingerprints of Ms. Spotted Eagle or Mr. Crawford. No comparison was ever made of this latent fingerprint to the known fingerprints of Ms. Everybody Talks About or anyone else

involved in these incidents, except Mr. Old Chief, Ms. Stephanie Spotted Eagle and Mr. Crawford.

2. Statement of Facts Relevant to The Petition

Mr. Old Chief was convicted of Count I: Felon in Possession of a Firearm, Count II: Using or Carrying a Firearm During Commission of a Violent Crime, and Count III: Assault With a Dangerous Weapon, felonies, in violation of 18 U.S.C. § 922(g), 18 U.S.C. § 924(c) and 18 U.S.C. § 1153 and 113(c), respectively. In support of the Felon in Possession charge, Count I specifically alleges that Mr. Old Chief has been convicted of one felony crime, to-wit: "...having been convicted of a felony crime punishable under the laws of the United States for a term of more than one year, that is, Assault Resulting in Serious Bodily Injury, in the United States District Court in and for the District of Montana, on the 28th day of September, 1989."

— Prior to trial, Mr. Old Chief moved the District Court in limine to order the prosecution to refrain from mentioning - by reading the Indictment, during jury selection, in opening statement, or closing argument - and to refrain from offering into evidence or soliciting any testimony from any witness regarding Mr. Old Chief's prior criminal conviction, except to state that he has been convicted of a crime punishable by imprisonment exceeding one (1) year. Mr. Old Chief argued, to the District Court and on appeal, that the jury would be, and was, unfairly influenced to convict Mr. Old Chief of Assault With a Dangerous Weapon (Count III) and Using or Carrying a Firearm During Commission of a Violent Crime (Count II) upon having been informed that he was previously convicted of Assault Resulting in Serious Bodily Injury.

Mr. Old Chief was willing to solve the problem by stipulating, agreeing and requesting the District Court to instruct the jury that he has been convicted of a crime punishable by

imprisonment exceeding one (1) year. See Defendant's Proposed Jury Instruction No. 7 (Appendix E at p. 15a). He thus admitted that the Government had proven one of the essential elements of the offense of Count I: Felon in Possession of a Firearm and the District Court would have instructed the jury that this element was proven. He contended that the evidence was thus irrelevant and prejudicial and that there was absolutely no need to inform the jury of the nature of the prior felony conviction. After hearing argument, the District Court denied the Motion in Limine.

This issue was presented as Mr. Old Chief's first issue on appeal to the Ninth Circuit. The panel rejected the argument holding that "the district court did not abuse its discretion by allowing the prosecution to introduce evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge." See Appendix A at p. 3a.

REASONS TO GRANT PETITION

THE DEFENDANT IN A FELON IN POSSESSION OF FIREARM CASE SHOULD BE PERMITTED TO STIPULATE TO HIS FELON STATUS. OTHERWISE, THE GOVERNMENT IS ALLOWED TO INTRODUCE EVIDENCE OF THE NATURE OF THE PRIOR FELONY WHICH IS HIGHLY PREJUDICIAL AND IRRELEVANT.

1. EVIDENCE OF THE DEFENDANT'S PRIOR FELONY CONVICTION IS PREJUDICIAL AND IRRELEVANT IN A FELON IN POSSESSION OF FIREARM CASE

Evidence of the defendant's prior felony conviction is prejudicial in a felon in possession of firearm (18 U.S.C. §922(g)(1) - App. C) case. Where the defendant is willing to stipulate to his felon status, the defendant's prior felony conviction is totally irrelevant and unnecessary.

One of the elements of the offense of felon in possession of firearm is that, at the time the defendant possessed the firearm, the defendant had been convicted of a felony. 18 U.S.C. §922(g)(1). Thus, in every case, the Government must prove beyond a reasonable doubt that the defendant has a prior felony conviction.

Evidence of the prior conviction, even the name of the crime of conviction, by itself is inherently prejudicial. Evidence is prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or triggers other mainsprings of human action...." 1 Weinstein's Evidence §403[3], pp. 37-41. "Unfair prejudice" means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, Notes of Advisory Committee.

Once the jury is told that the defendant has a prior felony conviction, the defendant is prejudiced -- the jury thinks that because he has been convicted before, he is likely to have committed another crime. This is the logic behind Fed. R. Evid. 609 which allows the

credibility of a witness, including a defendant, to be impeached by evidence of a prior conviction -- if he's been convicted before, you cannot believe him now.¹ In a felon in possession of firearms case, this prejudice becomes unfair when the name and nature of the prior felony conviction are brought to the jury's attention. In other words, it is bad enough that the jury is told that the defendant has a prior felony conviction but it is worse when the name and underlying facts of that conviction are presented to the jury.

As stated in the concurring opinion in United States v. Blackburn, 592 F.2d 300, 302 (6th Cir. 1979):

Disclosure of the nature of prior felony convictions makes it difficult to assure an accused a fair and impartial jury. Without doubt, it places an unnecessary burden upon the presumption of innocence. The government cannot justify the need for routinely referring to the nature of the prior felony convictions in the indictment.

Can a jury really presume that the accused is innocent when it is told, at the beginning of the trial, that the accused is already a convicted felon?

Many courts have recognized that this unfair prejudice cannot be overcome by limiting instructions. As stated by the District of Columbia Circuit in United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985):

To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities. In such cases, it becomes particularly unrealistic to expect effective execution of the "mental gymnastic" required by limiting instructions, *Nash v.*

¹ Under Rule 609, a defendant can keep evidence of his prior felony conviction out of consideration by choosing to not testify. Only by testifying does a defendant expose himself to impeachment. See United States v. Booker, 706 F.2d 860, 862 (8th Cir. 1983).

United States, 54 F.2d 1006, 1007 (2nd Cir.) (Learned Hand, J.) *cert. denied*, 285 U.S. 556, 52 S.Ct. 457, 76 L.Ed. 945 (1932), and "the naive assumption that prejudicial effects can be overcome by instructions to jury" becomes more clearly than ever "unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J., concurring). As the Third Circuit has observed, once evidence of prior crimes reaches the jury, "it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk." *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3rd Cir. 1975); *accord*, *United States v. Carter*, 482 F.2d 738, 740 (D.C. Cir. 1973). (Emphasis added).

A district court can keep that drop of ink from spreading by accepting a defendant's offer to stipulate and requiring the Government to agree to the stipulation.² The jury thus hears of the defendant's felony status and nothing more. The degree of prejudice is limited.

The First Circuit, in United States v. Tavares, 21 F.3d 1 (1st Cir. 1994), recently reversed its rule which allowed the Government to reject the defendant's offer to stipulate to the fact that he had a prior felony conviction. The First Circuit held that the Government was required to accept the defendant's stipulation to his status as a felon and could not introduce evidence of the nature of the prior felony absent special circumstances. 21 F.3d at 4-6. While the First Circuit recognized the inherent prejudice of evidence of the prior felony, noting that there existed "no reason, other than the government's decision to color the jury's perception of the defendant's character, for revealing the nature of the defendant's prior felony,"³ the court

² There are other possible remedies besides stipulation to felony status including severance and bifurcation. See, e.g., United States v. Jones, 16 F.3d 487, 492-493 (2nd Cir. 1994). However, in the case at bar, Mr. Old Chief sought only the remedy of stipulation.

³ Evidence of a prior crime that is particularly egregious, socially opprobrious, systematically dangerous or similar to the present prosecution would be "highly likely [to] influence the jury's perception of the defendant, suggesting that he is a sufficient threat to

hinged its decision on the fact that the nature of the prior felony conviction is not probative or relevant:

The fact concerning defendant's prior criminal record that §922(g)(1) explicitly makes "of consequence" is whether it includes a crime carrying a penalty of more than a year's imprisonment. It does not embrace additional facts such as a particular kind of felony. Congress required no gradation for seriousness, numerosity or recency, although such distinctions have in other contexts been given significance. See, e.g., 18 U.S.C. §924(c) (penalizing use of firearm in connection with crime of violence or drug trafficking crime); §924(e)(1) (increasing firearms possession penalty for defendant convicted of multiple violent felonies or "serious" drug offenses).

21 F.3d at 4.

In sum, evidence of the nature of the defendant's prior conviction in a felon in possession of firearm case is obviously prejudicial and clearly irrelevant. If a district court ignores this prejudice by refusing to remedy it, the defendant's right to a trial by a fair and impartial jury is seriously infringed.

society to warrant additional incarceration." 21 F.3d at 4.

2. THE CIRCUITS ARE SPLIT ON THE QUESTION OF WHETHER THE GOVERNMENT CAN BE REQUIRED TO STIPULATE TO THE DEFENDANT'S FELONY STATUS

Some of the Circuits (1st, 4th, 5th and 7th) have held that the Government should be required to stipulate that a defendant has a felony conviction and then be precluded from presenting any evidence about the conviction. Others (2nd, 3rd, 6th, 8th, and 9th⁴) have held that the Government cannot be forced to stipulate. Three other circuits (10th, 11th and D.C.) suggest that the trial court has the discretion either to require the Government to stipulate or to fashion an alternative remedy such as severance.

⁴ There is also a conflict within the Ninth Circuit. See United States v. Barker, 1 F.3d 957, 959 n.3 (9th Cir. 1993) and United States v. Breitkreutz, 8 F.3d 688, 692 (9th Cir. 1993). This conflict has been recognized by the First Circuit in Tavares. See 21 F.3d at 5. In his concurring opinion in Breitkreutz, Circuit Judge Norris highlighted the conflict as follows:

Barker held that a prosecution for the offense of being a convicted felon in possession of a firearm may not be bifurcated into two separate proceedings, one for each element of the offense, because the government must be permitted to prove each element to a jury. Unlike the majority in this case, however, Barker makes clear that while the government may put on evidence "proving an essential element of the charged offense," Id. at 959 (citing United States v. Campbell, 774 F.2d 354, 356 (9th Cir. 1985)), it may not inform the jury of the facts underlying the defendant's prior conviction, because they are not probative of whether the defendant is a convicted felon.

The majority creates a conflict not only with Barker, but also with the Fourth Circuit, which has held that once a defendant offers to stipulate to his status as a convicted felon, the prosecution may not put on evidence of the nature of the prior felony. See United States v. Poore, 594 F.2d 39, 41-43 (4th Cir. 1979) (requiring prosecution to strike reference in indictment to nature of defendant's prior felony conviction after defendant offered to stipulate to his status as convicted felon).

8 F.3d at 694-695.

The First Circuit in United States v. Tavares, 21 F.3d 1, 5 (1994) summarizes the positions of the various circuits. We have updated this and have provided a list set forth in Appendix F.

The Circuits which hold that the Government cannot be forced to stipulate to the prior felony are clearly wrong. "[W]here there exists no reason, other than the government's desire to color the jury's perception of the defendant's character, for revealing the nature of the defendant's prior felony" to the jury, the trial court must be given the power to limit the evidence to the essential fact, and no more, that there is a prior felony conviction. 21 F.3d at 5.

If a defendant offers to stipulate to his felony status, he should not be precluded from so doing simply because he allegedly committed the offense of felon in possession of firearm in the wrong district. A rule of fairness and justice in the 1st, 4th, 5th and 7th Circuits becomes a rule of unfairness and injustice in the 2nd, 3rd, 6th, 8th and 9th Circuits. This Court should grant certiorari in order to make the rule uniform in all courts of the United States, i.e., that the Government be required to accept a defendant's stipulation to his felony status and be precluded from introducing evidence of the nature of the prior felony absent special circumstances.

3. THE INTRODUCTION AND ADMISSION INTO EVIDENCE OF MR. OLD CHIEF'S PRIOR ASSAULT CONVICTION WAS PREJUDICIAL, NOT PROBATIVE, WHERE THE DEFENSE AGREED TO STIPULATE THAT HE HAD A PRIOR FELONY CONVICTION AND HE WAS CHARGED WITH ASSAULT WITH A DANGEROUS WEAPON

The primary charge against Mr. Old Chief was Assault With a Dangerous Weapon (Count III) in violation of 18 U.S.C. §113(c). However, Count I, the Felon in Possession of Firearm charge, specifically alleged that Mr. Old Chief had previously been convicted of Assault Resulting in Serious Bodily Injury. How could the jury objectively and impassionately weigh

the evidence with respect to Count III knowing that Mr. Old Chief had already committed a Felony Assault?

Mr. Old Chief was willing to solve the problem by stipulating, agreeing and requesting the District Court to instruct the jury that he has been convicted of a crime punishable by imprisonment exceeding one (1) year. See Defendant's Proposed Jury Instruction No. 7 (App. E at p. 15a). He thus admitted that the Government had proven one of the essential elements of the offense of Count I: Felon in Possession of a Firearm and the District Court would have instructed the jury that this element was proven. The evidence was thus irrelevant and there was absolutely no need to inform the jury of the nature of the prior felony conviction.

The Government refused to stipulate and the District Court decided that it would not force the Government to stipulate. The District Court ignored the obvious -- the fact that there was an assault conviction was not probative. All that the pertinent section, §922(g)(1), requires is a felony conviction. Mr. Old Chief admitted that he had a felony conviction and requested that the jury be so instructed. This fact was not contested and the element was no longer at issue. As stated in United States v. Tavares, *supra*, the remedy is simple:

...because the nature of the predicate felony is wholly unrelated to the crime for which the defendant is on trial, excluding the extraneous information concerning its nature should create no burden for either the court or the government. The defendant's unadorned stipulation could be read to the jury or, if the government preferred, a redacted judgment of conviction could be introduced into evidence. Severing the admissible evidence from the inadmissible thus would require neither sensitive nor difficult judgments.

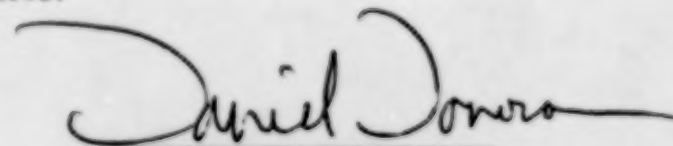
21 F.3d at 4-5.

The element required to be proven for Felon in Possession of a Firearm was that Mr. Old Chief had been convicted of a felony. There was no need to tell the jury that the particular felony was Assault Resulting in Serious Bodily Injury. Because the Government was allowed to introduce and present evidence of the prior assault conviction, it is likely that the jury convicted Mr. Old Chief based on his past misconduct rather than on proof beyond a reasonable doubt of the present charges.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED this 17th day of October, 1995.



ANTHONY R. GALLAGHER
Chief Federal Defender for the
District of Montana
*DANIEL DONOVAN
Assistant Federal Defender
Federal Defenders of Montana
Suite 302, The Liberty Center
#9 Third Street North
Great Falls, Montana 59401
(406) 727-5328

*Counsel of Record

APPENDIX A

OPINION

OF THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

JUNE 5, 1995 (UNREPORTED)

FILED

MAY 31 1995

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

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JUN 5 1995

FEDERAL DEFENDERS
OF MONTANA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHNNY LYNN OLD CHIEF,
Defendant-Appellant.

No. 94-30277
D.C. No. CR-94-03-GF-PGH

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding
Argued and Submitted April 14, 1995
Seattle, Washington

Before: WRIGHT, POOLE and WIGGINS, Circuit Judges.

Johnny Lynn Old Chief ("Old Chief") appeals his criminal convictions rendered by jury verdict in the federal district of Montana. Old Chief was convicted of being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon. The offenses charged took place on an Indian reservation, thus violating 18 U.S.C. § 1153.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Old Chief appeals on five grounds: (1) that the district court erred by allowing the prosecution to introduce extrinsic evidence of his prior felony conviction despite his offer to stipulate to his felon status; (2) that the district court erred by not ordering the prosecution to conduct fingerprint comparisons of all witnesses and individuals present at the scene of the offenses; (3) that his convictions on the assault charge and use enhancement were not supported by substantial evidence; (4) that the district court erred by not conducting a post-verdict evidentiary hearing regarding jury misconduct; and (5) that the district court improperly imposed a 57-month upward departure on his unlawful possession sentence in violation of the federal sentencing guidelines. For the reasons set forth below, we affirm Old Chief's convictions; however, we reverse his sentence and remand for resentencing.

I. INTRODUCTION OF OLD CHIEF'S PRIOR FELONY CONVICTION.

We review the district court's decision to admit or exclude evidence for an abuse of discretion. United States v. Mullins, 992 F.2d 1472, 1476 (9th Cir. 1993). Prior to trial, Old Chief made an offer to stipulate to his status as a convicted felon. He argued that introduction of his prior felony assault conviction to prove the element of the unlawful possession charge would be unduly prejudicial. The prosecution refused to stipulate, and the district court denied Old Chief's motion.

Regardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence. See United States v. Breitkreutz, 8 F.3d 688, 690 (9th Cir. 1993) (citing United States v. Gilman, 684 F.2d 616, 622 (9th Cir. 1982)). Under Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the FRE 403 balancing process. Breitkreutz, 8 F.3d at 691-92.

Old Chief argues that our decision here is controlled by that in United States v. Hernandez, 27 F.3d 1403 (9th Cir. 1994), cert. denied, 115 S.Ct. 1147 (1995). But Hernandez stands for the proposition that a defendant's stipulation to a prior felony is sufficient evidence to fulfill the requisite element of § 922(g)(1). It cannot be read for the quite different proposition that a defendant's stipulation to a prior felony must always be accepted to prove the requisite element of § 922(g)(1).

Thus, we hold that the district court did not abuse its discretion by allowing the prosecution to introduce evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge.

II. REFUSAL TO COMPEL THE PROSECUTION TO CONDUCT FINGERPRINT COMPARISONS.

A district court's decision as to alleged Brady violations is reviewed de novo. United States v. Woodley, 9 F.3d 774, 777 (9th Cir. 1993). The law of the Ninth Circuit is unequivocal on this point: "[t]he prosecution is under no obligation to turn over

materials not under its control." See United States v. Dominguez-Villa, 954 F.2d 562, 566 (9th Cir. 1992) (quoting United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991)).

Here, the one latent fingerprint "of value" was recovered from the bullet clip of the weapon used in the assault. Old Chief argues that, once it was determined that the latent fingerprint on the bullet clip did not match his known prints, the district court should have compelled the prosecution to conduct fingerprint comparisons of all the witnesses at the scenes of the offenses. Specifically, he contends that if the comparison resulted in a match between the latent print and the prosecution's key witness, that witness's crucial testimony would have been substantially impeached. Old Chief, however, did have access to the results of the fingerprint analysis that was conducted by the prosecution.

Consistent with its Brady obligations, the prosecutor turned over the potentially exculpatory results of the fingerprint analysis conducted for Old Chief and his two defense witnesses that claimed to have had contact with the gun on the day of the assault. Old Chief argued this lack of fingerprint evidence in his defense.

What Old Chief argues now, in sum, is that the prosecution's failure to obtain its own witness's fingerprints for comparison precluded and impaired his ability to present his defense. Old Chief's request, however, was tantamount to forcing the prosecution to secure evidence, not already in its possession, for use in the impeachment of its own witness. This is not required under Brady or Dominguez-Villa.

III. SUFFICIENCY OF EVIDENCE ON THE ASSAULT CHARGE AND USE ENHANCEMENT.

In determining whether the evidence was sufficient to support a conviction, we must determine whether, viewing all the evidence in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt of each essential element of the crimes charged. Jackson v. Virginia, 443 U.S. 307, 320 (1979); United States v. Lennick, 18 F.3d 814, 819 (9th Cir. 1994).

Old Chief argues that there was insufficient evidence to convict him on the assault charge and, therefore, the use enhancement. Specifically, he argues that, assuming he did fire the shot at the victim, Anthony Calf Looking, there was no evidence that he acted with specific intent to do bodily harm, nor that the gunshot caused Calf Looking to fear immediate bodily harm.

The only uncontroverted occurrence regarding the assault is that the victim, Calf Looking, provoked the fight with Old Chief. Only one witness testified at trial that she actually saw Old Chief point the gun directly at Calf Looking and fire in his direction.

Once on the stand, Calf Looking apparently began to retreat from his earlier statements to the police. However, the prosecution witness's version of the events was corroborated by the investigating officer's testimony regarding his interview with Calf Looking the morning after the incident. Thus, despite the fact that the investigating officer's testimony impeaching Calf Looking

may not be substantive evidence, it tends to bolster the direct testimony of the prosecution's key witness. Moreover, Calf Looking testified that he heard the shot, and that he ran because he "must have been scared" of Old Chief.

In addition, a rational fact finder could conclude that the testimony offered by Old Chief's two defense witnesses was not credible. Given the inconsistencies between the witnesses' accounts of the day's events, a rational fact finder could reasonably disregard both their testimony in favor of that of the prosecution witness. Thus, considering the prosecution witness's testimony, and Calf Looking's statements regarding his fear of Old Chief, a rational trier of fact could find sufficient evidence to convict Old Chief on the assault charge.

IV. REFUSAL TO CONDUCT A POST-VERDICT EVIDENTIARY HEARING.

A district court's denial of a motion for a post-verdict evidentiary hearing is reviewed for an abuse of discretion. United States v. Langford, 802 F.2d 1176, 1180 (9th Cir. 1986), cert. denied 483 U.S. 1008 (1987). Old Chief argues that the district court should have conducted such a hearing to determine whether one juror's question to the judge and a second juror's whispers during the jury poll improperly influenced the jury's deliberations.

Despite Old Chief's attempt to characterize the whispers of one juror to another during the jury poll as an "outside influence," he made no showing of improper external influence sufficient to warrant a post-verdict evidentiary hearing. See Tanner

v. United States, 483 U.S. 107, 127 (1987) (holding that district court did not err in deciding that a post-verdict hearing was unnecessary, despite juror's allegations of excessive alcohol consumption and illegal drug use during deliberations).

This Court has held that "where a trial court learns of a possible incident of jury misconduct, it is preferable to hold an evidentiary hearing 'to determine the precise nature of the extraneous information,' [internal citations omitted] [however,] not every allegation that extraneous information has reached the jury requires a full-dress hearing." United States v. Langford, 802 F.2d 1176, 1180 (9th Cir. 1986) (emphasis added). Under Tanner and Langford, the jury's exposure or access to improper external influence guides the decision whether a court should conduct a post-verdict evidentiary hearing.

Here, the juror's rather innocuous question to the court during the poll-- and the other juror's "urging," if any,--did not imply any improper external influence on the jury's deliberations. Thus, the district court acted within its discretion in declining to contact the juror in order to hold a post-verdict evidentiary hearing.

V. IMPOSITION OF A 57-MONTH UPWARD DEPARTURE TO A TOTAL SENTENCE OF 120 MONTHS ON THE UNLAWFUL POSSESSION CHARGE.

Finally, Old Chief argues that the district court made an unreasonable upward departure in his sentence on the unlawful possession charge, thus, violating the Sentencing Reform Act of 1984

and the Sentencing Guidelines. Old Chief's arguments on this issue have merit.

Because this was his third felony assault conviction in federal court, Old Chief was designated a "career offender." Given this designation and the levels of his current offenses, the maximum sentence Old Chief could have received under the Guidelines was 51-63 months. The district court, however, departed upward to a sentence of 120 months, imposing an additional 57-month sentence on the unlawful possession count. The term of 60 months on the assault charge, was to be served concurrently. Thus, in effect, what should have been a five-year sentence, became a ten-year sentence. Moreover, the Guidelines impose a mandatory five-year enhancement on the "use" conviction, which the judge ordered to be served consecutively.

This Court established a three-step process for the review of an upward departure from the Sentencing Guidelines in United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991) (en banc). First, the reviewing court must determine if the district court had legal authority to depart. Id. at 746. Second, any factual findings supporting the existence of an aggravating circumstance used to support an upward departure must be reviewed for clear error. Id. Third, the extent of the upward departure must be reasonable in light of the structure, standards and policies of the Guidelines. Id. at 751.

Apparently, the district court based its upward departure on the reports of the Probation Officer and U.S. Attorney that Old Chief's serious record as a juvenile offender was not reflected in

his current offender designation. An upward departure is warranted when "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct." See United States v. Streit, 962 F.2d 894, 903 (9th Cir. 1992). However, the district court "must specify the events in the defendant's criminal history that it believes are inadequately represented in the guidelines criminal history calculation." Id. (citing United States v. Hoyungowa, 930 F.2d 744, 747 (9th Cir. 1991)). The current record is, unfortunately, silent in this regard.¹

The district court's only statement regarding Old Chief's prior history was that "Mr. Old Chief and I have got [sic] to be friends over the years." Although we might assume that this statement was meant to be an adoption of the specific factual findings contained in Old Chief's presentence report, see Streit, 962 F.2d at 903, the district court's statements in the current record are too ambiguous to explain the extent of its upward departure. See United States v. Quintero, 21 F.3d 885, 894-95 (9th Cir. 1994).

"In order to facilitate appellate review, the district court must explain in detail the reasons behind the imposition of a particular sentence, analogizing to other Guidelines provisions." Id. at 894 (quoting United States v. Hicks, 997 F.2d 594, 599 (9th Cir. 1993)). Here, the court simply stated ". . . here again we

¹ We commend Assistant United States Attorney Carl Rostad for candidly acknowledging his responsibility as a prosecutor to suggest additional findings to the district court that might assist the court of appeals, especially in sentencing matters.

find that [Old Chief] had just been released from custody very shortly before this occurred. There is the loaded gun. And he is a danger to the community, and a serious danger. I think there's no question about that." Even if we accept these statements as an indication of aggravating factors in support of an upward departure, the district court failed to articulate the specific reasons for the extent of its departure--nearly double the maximum sentence--by analogy to other Guidelines provisions. See Hicks, 997 F.2d at 599.

"If the district court fails to articulate reasons for the extent of departure or if the analogy is not reasonable, [the panel on appellate review] must vacate and remand." Id. (emphasis in original) (quoting Streit, 962 F.2d at 903). Here, because the district court neither articulated the reasons for such an extreme departure, nor analogized the reasons to particular provisions of the Guidelines, we are unable to evaluate the reasonableness of the sentence imposed as required under Lira-Barraza. Thus, we vacate Old Chief's sentence and remand the case for resentencing consistent with the guidelines set forth above.

VI. CONCLUSION

The district court did not abuse its discretion by allowing the prosecution to introduce extrinsic evidence of Old Chief's prior conviction, despite his offer to stipulate. Further, the district court did not err by refusing to order the prosecution to compare the latent fingerprint found on the weapon clip to the other witnesses at the scene of the offenses. The prosecution satisfied its Brady obligation by providing Old Chief with the

potentially exculpatory evidence that the latent print did not match his known prints.

The evidence was sufficient to support Old Chief's conviction on the assault charge; and, the district court did not abuse its discretion when it refused to conduct a post-verdict evidentiary hearing regarding alleged jury misconduct. As such, Old Chief's convictions are **AFFIRMED**.

However, because the district court failed to articulate specific reasons for its extreme upward departure by analogy to the federal sentencing guidelines, we vacate Old Chief's sentence and **REMAND FOR RESENTENCING**.

APPENDIX B

ORDER

OF THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

(AUGUST 2, 1995)

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG - 2 1995 ✓

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHNNY LYNN OLD CHIEF,
Defendant-Appellant.

No. 94-30277
D.C. No. CR-94-03-GF-PGH

ORDER

RECEIVED

AUG 7 1995

FEDERAL DEFENDERS
OF ALASKA

Before: WRIGHT, POOLE and WIGGINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

Title 18 United States Code Section 922(g)(1)

Felon in Possession of a Firearm

§ 922(g)(1) Felon in Possession of a Firearm

It shall be unlawful for any person --

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

APPENDIX D

CONSTITUTION

OF THE

UNITED STATES

Amendments V and VI

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.....

FIFTH AMENDMENT

No person shall...be deprived of life, liberty, or property, without due process of law....

APPENDIX E

DEFENDANT'S PROPOSED
JURY INSTRUCTION NO. 7

INSTRUCTION NO. _____

The phrase "crime punishable by imprisonment for a term exceeding one year" generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable by a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.

In hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year.

APPENDIX F

LIST
OF CASES
FROM ALL THE CIRCUITS

Defendant's Proposed Instruction No. 7

SOURCE: Devitt, Blackmar, Wolff & O'Malley, Federal Jury Practice and Instructions (4th Ed.) §36.10

- 1st Circuit: United States v. Tavares, 21 F.3d 1, 5-6 (1st Cir. 1994) (Government required to accept defendant's stipulation to defendant's status as felon and could not introduce evidence of nature of prior felony absent special circumstances)
- 2nd Circuit: United States v. Gilliam, 994 F.2d 97, 103 (2nd Cir. 1993) (Government not required to accept stipulation but underlying facts of prior conviction not admissible) But See United States v. Jones, 16 F.3d 487, 492-493 (2nd Cir. 1994) ("[J]oiner of an ex-felon count with other charges requires either severance, bifurcation, or some other ameliorative procedure")
- 3rd Circuit: United States v. Williams, 612 F.2d 735, 740 (3rd Cir. 1979) (Government is not required to stipulate that the defendant is a convicted felon); See Also United States v. Jacobs, 44 F.3d 1219, 1223-1224 (3rd Cir. 1995) (Felon in possession of firearm defendant was not entitled to bifurcation of element of possession from element of prior conviction so jury could determine possession before learning of defendant's prior conviction); Compare United States v. Busic, 587 F.2d 577, 585 (3rd Cir. 1978), *rev'd on other grounds*, 446 U.S. 398, 100 S.Ct. 1447, 64 L.Ed.2d 381 (1980) (If a defendant is charged with multiple offenses, including one requiring proof of a prior felony conviction, the trial judge should sever the latter offense unless the conviction would be independently admissible with respect to the other charges)
- 4th Circuit: United States v. Poore, 594 F.2d 39, 41-43 (4th Cir. 1979) (District Court is required to strike the nature of the prior felony conviction from indictment where defendant stipulated that he had previously been convicted of a felony); *affirmed*, United States v. Rhodes, 32 F.3d 867, 875 (4th Cir. 1994) ("[W]hen a defendant offers to stipulate the fact of his prior felony conviction, evidence of the nature of the conviction is irrelevant and should be stricken."); See Also United States v. Milton, 52 F.3d 78, 81 n.7 (4th Cir. 1995) ("[I]f a defendant offers to stipulate to the fact of the prior felony conviction, evidence of the nature of the conviction is irrelevant and will not be admitted.")
- 5th Circuit: United States v. Spletzer, 535 F.2d 950, 955-956 (5th Cir. 1976) (Where defendant admitted that he had been convicted, district court erred by admitting into evidence a certified copy of defendant's prior judgment of conviction); *affirmed* United States v. Palmer, 37 F.3d 1080, 1084 (5th Cir. 1994) ("After a

stipulation of the fact of a predicate conviction for the felon in possession of a firearm offense, the legal question of status is still a relevant issue; however, the predicate crime is significant only to demonstrate status, and the issue of status does not depend on the probative value of the evidence.")

- 6th Circuit: United States v. Blackburn, 592 F.2d 300, 301 (6th Cir. 1979) (Trial court did not err by refusing to accept defendant's offer to stipulate to his felony convictions in order to avoid disclosing their nature to the jury)
- 7th Circuit: United States v. Pirovolos, 844 F.2d 415, 420 (7th Cir. 1988) (The trial judge should not have admitted evidence of the defendant's prior convictions because the defendant's proffered stipulation that he had been convicted of a prior felony was sufficient)
- 8th Circuit: United States v. Bruton, 647 F.2d 818, 825 (8th Cir. 1981) (The Government is not required to accept a defendant's stipulation to a prior felony conviction in lieu of proof of that element of its case); *affirmed* United States v. Booker, 706 F.2d 860, 862 (8th Cir. 1983) (In felon in possession of firearm case, Government may reject defendant's offer to stipulate to his prior conviction and elect to put on its proof thereof)
- 9th Circuit: United States v. Barker, 1 F.3d 957, 959 n.3 (9th Cir. 1993), as amended, 20 F.3d 365, 366 n.3 (9th Cir. 1994) ("The underlying facts of the prior conviction are completely irrelevant under §922(g)(1); the existence of the conviction itself is not")
- United States v. Breitreutz, 8 F.3d 688, 692 (9th Cir. 1993) (Rejecting stipulation as an alternative form of proof and noting that the prosecution has the right to refuse to stipulate); United States v. Blackstone, 56 F.3d 1143, 1146 (9th Cir. 1995) ("[T]he government was not required to accept [the defendant's] offer to stipulate to the fact of his prior conviction")
- 10th Circuit: United States v. Brinklow, 560 F.2d 1003, 1006 (10th Cir. 1977) (No abuse of discretion where trial court refused defendant's offer to stipulate that he is a convicted felon -- it is a discretionary matter with the trial court)

11th Circuit:

United States v. O'Shea, 724 F.2d 1514, 1516-1517 (11th Cir. 1984) (District Court did not abuse its discretion by refusing to accept the defendant's proffered stipulation because it was likely that defendant's past conviction ultimately would be revealed anyway); See Also United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985) ("This circuit has refused to adopt a per se rule either for or against admission of evidence when that evidence is relevant to an issue to which the defendant offers to stipulate....the offer to stipulate [is analyzed] as one factor in making the Rule 403 determination")

D.C. Circuit:

United States v. Dockery, 955 F.2d 50, 54 (D.C. Cir. 1992) (Failure to sever felon in possession of firearm count from drug counts was abuse of discretion where government successfully resisted defense efforts to introduce prior conviction by stipulation or to try count to judge, and repeatedly referred to defendant's prior conviction during trial); see also United States v. Fennell, 53 F.3d 1296, 1301-1302 (D.C. Cir. 1995) (When a felon in possession of firearms charge is tried jointly with drug charges, "the trial court must proceed with a 'high level of care' in order to protect the defendant from the potential for prejudice resulting from the introduction of what would otherwise be inadmissible prior bad acts evidence")